

No. 82 973

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Supreme Court of the United States

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

-against-

PREDRAG STEVIC

**BRIEF OF *AMICUS CURIAE* IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Lawyers Committee for
International Human Rights
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

- against -

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PRELIMINARY STATEMENT

This brief is offered by the
Lawyers Committee for International Human
Rights as an amicus curiae in this
matter. Since 1978, the Committee has
assisted in providing legal representa-
tion for numerous applicants for
political asylum in the United States

United States from countries all over the world. The parties have consented in writing to the submission of this brief.

REASONS WHY THE PETITION FOR
CERTIORARI SHOULD NOT BE GRANTED

1. Petitioner's assertion that the decision below "squarely conflicts" with the decision of the Third Circuit in Rejaie v. INS, 691 F. 2d 139 (3d Cir. 1982), is premature. In view of the relief accorded below, review by the Court is not now necessary. Furthermore, the decision below is correct, as the Sixth Circuit has recognized, and other circuits, including the Third Circuit, will continue to have the opportunity to decide the issue and are likely to follow the decision below.

2. The Second Circuit, in the decision below, remanded the case for a plenary hearing under the appropriate legal standard, stating that "further development must await concrete factual

situations as they arise." Appendix of Petitioner at 24a. Review by the Court would be necessary only in the event that the quantum of evidence produced at the hearing by Mr. Stevic would cause a different result under the legal standards in contention, an inquiry that the Board of Immigration Appeals is undertaking in such cases, as appears, infra, at page 8.

3. Furthermore, the decision below is clearly correct. The Second Circuit ruled that the standard for withholding an alien's deportation to a particular country on the ground that that alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, had been changed by the passage of the Refu-

gee Act of 1980, which was inspired by the accession of the United States to the 1967 Protocol Relating to the Status of Refugees of the United Nations.^{1/} The 1980 Act provided, for the first time, a definition of the term "refugee," as:

... any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42).

A corresponding definition of the term "refugee" appears in the Protocol at Article 1(2), which was included in

^{1/} The United States acceded to the Protocol in 1968. 19 U.S.T. 6223; T.I.A.S. No. 6577.

pertinent part in the accession of the United States.

In interpreting the term "refugee," the Second Circuit referred to the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status (Geneva 1979) (hereinafter "Handbook") as a distillation of the "High Commissioner's 25 years of experience, the practices of governments acceding to the Protocol and literature on the subject." Appendix of Petitioner at 15a.^{2/}

The international experience teaches that the formulation "well-

2/ The Board of Immigration Appeals has itself treated the Handbook as a significant source of guidance as to the meaning of the Protocol. Matter of Rodriguez-Palma, Interim Decision No. 2815 (BIA 1980).

founded fear of persecution" requires both a subjective state of mind and an objective, external situation that tends to confirm that state of mind. Handbook at ¶39.^{3/} As to the subjective element, a sensitive inquiry into an alien's "personality" is required in order to ascertain whether the predominant motive for the asylum claim is fear. Handbook at ¶s 40 and 41. As to the objective element, an alien must normally show "good reason why he individually fears persecution." Handbook at ¶45.

The withholding of deportation statute at issue in the decision below also underwent substantial change in the Refugee Act of 1980 in order to conform

^{3/} The pertinent provisions of the Handbook appear in an appendix submitted herewith.

the prior provision with its analogue under the Protocol. The statute now reads:

The Attorney General shall not deport or return any alien... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h).

The corresponding provision in the Protocol provides:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Article 33(1).

As the prohibition concerns "refugees", the "well-founded fear" standard obtains, as the Second Circuit recognized in the decision below.

4. It is unclear whether the Third Circuit would have decided Rejaie differently had it not reached the refugee standard issue, in view of its finding that the alien had failed to respond to the Board's determination that he had not submitted sufficient, new evidence, as required by the regulations, to justify reopening his asylum claim. Appendix of Petitioner at 42a and 43a. The facial disparity in the standards in contention, moreover, is significant -- "clear probability", which focuses exclusively upon an external, objective situation; and "well-founded fear", which focuses upon a subjective state of mind and whether there are external circumstances which tend to confirm that state of mind. The Third Circuit's

efforts to reconcile the disparity are unpersuasive.^{4/}

Over time, other Circuits, perhaps including the Third Circuit, are likely to recognize the correctness of the decision below, as well as the unpersuasive character of the pronouncements in Rejaie. Indeed, the Sixth Circuit recently followed the decision below and rejected the decision in Rejaie, of which it was aware. Reyes v. INS, 693 F.2d 597 (6th Cir. 1982); Petition at 11 n.12. Other Circuits will be addressing the issue and are likely to follow the decision below. Consideration by the Court at this juncture would be premature.

5. Nor is the decision below likely to "impose a substantial

^{4/} Mr. Rejaie did not file a petition for a writ of certiorari.

administrative burden" on the agency as predicted by petitioner. In those cases in which the Board of Immigration Appeals has recently addressed the issue, the impact of refugee standard issue appears to be of little consequence. The statement in a November 1, 1982, decision by the Board of Immigration Appeals in an asylum case is typical:

An applicant for asylum or withholding of deportation must show that, if deported, he would be subject to persecution or that he has a well-founded fear of persecution based on his race, religion, nationality, membership in a particular social group, or political opinion. Section 208(a) of the Act. See section 243(h) of the Act; Rejaie v. INS, ___ F.2d ___, Nos. 81-2375 and 82-3195 (3 ___ Cir., October 13, 1982); McMullen v. INS, 658 F.2d 1312 (9 Cir. 1981); Kashani v. INS,

547 F.2d 376 (7 Cir. 1977); Matter of Portales, Interim Decision 2905 (BIA 1982); Matter of Martinez-Romero, Interim Decision 2872 (BIA 1981); Matter of Dunar, 14 I&N Dec. 310 (BIA 1973). See also Stevic v. Sava, 678 F.2d 401 (2 Cir. 1982).

The applicant has not established that he will be persecuted or that he has a well-founded fear of persecution within the contemplation of section 208(a) or 243(h) of the Act, regardless of whether his claim is assessed in terms of whether he has demonstrated a "clear probability," a "good reason", or a "realistic likelihood." Matter of Matelot, Interim Dec. No. 2927 (BIA 1982).

In view of the position taken by the Board, the administrative impact of the issue is likely to be modest.

CONCLUSION

The petition for writ of
certiorari should be denied.

Respectfully submitted.

Lawyers Committee for
International Human
Rights
by Arthur C. Helton

February 1983

APPENDIX

Handbook on Procedures and Criteria for
Determining Refugee Status

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted" --for the reasons stated --by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One

person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences --in other words, everything that may serve to indicate that the pre-dominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.